No. 95-1794

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS MASOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury that it could convict petitioner of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), under a *Pinkerton* or aiding and abetting theory of liability.

2. Whether the district court committed reversible error in failing to instruct the jury that, in order to convict petitioner of conducting or participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c), it must find that he participated in the operation or management of the RICO enterprise.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 73 F.3d 1233.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1996. The petition for rehearing was denied on February 1, 1996. Pet. App. 19a-20a. The petition for a writ of certiorari was filed on May 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering, in violation of

the RICO statute, 18 U.S.C. 1962(c); racketeering conspiracy, in violation of 18 U.S.C. 1962(d); conspiracy to commit arson of an FBI surveillance post, in violation of 18 U.S.C. 371; arson of the surveillance post, in violation of 18 U.S.C. 844(f); destruction of government property, in violation of 18 U.S.C. 1361; conspiracy to commit robbery, in violation of 18 U.S.C. 1951; robbery, in violation of Section 1951; conspiracy to steal from an interstate shipment, in violation of 18 U.S.C. 371; theft from an interstate shipment, in violation of 18 U.S.C. 659; conspiracy to make extortionate extensions of credit, in violation of 18 U.S.C. 892; conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894; conspiracy to commit credit card fraud, in violation of 18 U.S.C. 1029(b)(2); credit card fraud, in violation of 18 U.S.C. 1029(a)(2); and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 248 months' imprisonment, to be followed by a six-year term of supervised release. Pet. App. 1a-2a. The court of appeals affirmed. *Id.* at 1a-18a.

1. In July 1990, the FBI began an investigation of petitioner, who was believed to be an associate of the Gambino Family of La Cosa Nostra. In the investigation, the FBI set up a surveillance post in a building located on the same street as a restaurant owned and operated by petitioner. In January 1991, petitioner became aware of the surveillance post and recruited a friend, Frank Scerbo, and one of Scerbo's acquaintances, Joseph Lucas, to burn down the building where the surveillance post was located. On February 22, 1991, Lucas set fire to the building. Pet. App. 3a.

After the arson, petitioner, Lucas, Scerbo, and Peter Bertuglia formed a "crew," as the courts below described it, to engage in criminal activity. Petitioner was the leader. As a member of the Gambino Family, petitioner had the means to provide the crew members with the necessary "backing" to commit their crimes. He could protect the crew from competing crime organizations and distribute the proceeds of crimes through established networks. Eventually, other persons joined the crew. Pet. App. 3a-4a.

In June 1991, the crew began to hijack trucks carrying commercial goods. On June 18, the crew stole a truck containing approximately 150 cases of telephones. Petitioner helped the crew store the truck and sell the telephones. In addition, he personally received some of the stolen telephones and proceeds from their sale. On July 23, the crew hijacked a truck containing a shipment of yarn. During the course of the robbery, crew members carried guns, and one of the members used a gun to force the driver from the truck. The crew planned and executed additional truck hijackings in 1991 and 1992, in addition to engaging in a variety of other criminal activities. Pet. App. 4a.

2. On appeal, petitioner contended, first, that the district court erroneously declined to instruct the jury that, in order to convict him on the RICO counts, it had to find that he participated in the operation or management of the RICO enterprise. In light of this Court's decision in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), which adopted an "operation or management" test for determining whether a person conducted or participated in the conduct of a RICO enterprise, the court of appeals agreed with petitioner's contention. Pet. App. 8a-10a. The court concluded,

however, that the instructional error was harmless. *Id.* at 10a-11a. In so doing, the court explained that, based on the evidence at trial, "the jury only could have found that [petitioner] either was the leader of the crew or was not a crew member at all. Consequently, the district court's failure to instruct the jury that it must find [petitioner] to have been involved in the 'operation or management' of the crew could not have affected the jury's verdict, because the jury only could have found [petitioner] guilty based upon his leadership and management of the crew." *Id.* at 11a.

Next, petitioner asserted that the district court incorrectly instructed the jury that it could convict him of using or carrying a firearm during and in relation to a crime of violence under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), without requiring a finding that he personally performed some act that directly facilitated or encouraged the use or carrying of the firearm. The court of appeals rejected that argument, explaining that proof of some act of facilitation or encouragement is necessary to establish liability under an aiding and abetting theory, not under a *Pinkerton* theory. Pet. App. 12a-13a. The court observed that it is "well-settled" that a jury may convict a defendant for violating 18 U.S.C. 924(c) under a *Pinkerton* theory. Pet. App. 12a.

Third, petitioner argued that the district court's instructions erroneously allowed the jury to convict him for violating Section 924(c) on an aiding and abetting theory based on his "mere knowledge" that members of the crew might use firearms. The court of appeals agreed with petitioner's statement of the applicable law—that a defendant may not be convicted as an aider and abettor under Section 924(c) merely

because he knew that a firearm would be used or carried; rather, the defendant must have performed some act that directly facilitated or encouraged the offense. Pet. App. 14a. The court concluded, however, that the district court's aiding and abetting instructions were sufficient, since they "clearly directed the jury that it could not convict [petitioner] unless it found that he participated in the use and carrying of a firearm." *Id.* at 15a.

Finally, petitioner maintained that the evidence was insufficient to support his Section 924(c) conviction. The court of appeals rejected that claim, sustaining the conviction under the *Pinkerton* theory. Pet. App. 15a. The court explained that there was ample evidence to show that petitioner was a member of the conspiracy to hijack trucks; that members of the conspiracy used or carried firearms in connection with a truck hijacking; that their use and carrying of the firearms was foreseeable by petitioner; and that the guns were employed in relation to the conspiracy to commit robbery. *Id.* at 17a-18a.[1]

ARGUMENT

1. Petitioner's conviction for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), rested on the evidence that his co-conspirators carried guns during the July 23, 1991, truck hijacking, that one of them used a gun to force the driver out of the truck, and that peti-

[1] In view of its holding that the evidence supported petitioner's Section 924(c) conviction under a *Pinkerton* theory, the court of appeals did not also review the sufficiency of the evidence under an aiding and abetting theory. Pet. App. 18a n.6.

tioner knew that members of the crew used guns during truck robberies. In support of the charge, the government posited two theories of criminal liability: co-conspirator liability under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), and aiding and abetting. Under the *Pinkerton* theory of liability, a defendant can be held accountable for the substantive crime of a co-conspirator so long as the crime was committed in furtherance of the conspiracy and was reasonably foreseeable by the defendant. *Id.* at 647; see *United States* v. *Romero*, 897 F.2d 47, 51 (2d Cir.), cert. denied, 497 U.S. 1010 (1990). Under the aiding and abetting theory of liability, a person may be held accountable as a principal for any crime he "aids, abets, counsels, commands, induces or procures." 18 U.S.C. 2(a). Relying on *Bailey* v. *United States*, 116 S. Ct. 501 (1995), petitioner contends (Pet. 6-13) that neither theory of liability may be employed in a Section 924(c) prosecution because, in order to be convicted under that statute, the defendant must personally use or carry the firearm.

As a preliminary matter, petitioner did not raise this claim either in the district court or the court of appeals. Rather, his only claims in the court of appeals pertaining to the Section 924(c) charge were that the district court gave defective jury instructions on the *Pinkerton* and aiding and abetting theories of liability, and that the evidence was insufficient to establish his guilt under those theories. Petitioner may not assert his claim for the first time in this Court. See *Schiro* v. *Farley*, 114 S. Ct. 783, 788 (1994); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Issues not raised below are deemed waived. See *Davis* v. *United States*, 495 U.S. 472, 489 (1990).

Petitioner's claim also fails on the merits. In *Bailey*, one of the defendants was arrested after police officers, who had stopped him for a traffic offense, found cocaine in the passenger compartment of the car and a loaded gun in the trunk. A second defendant kept crack cocaine in her bedroom and an unloaded gun in a locked footlocker in the bedroom closet. 116 S. Ct. at 503-504. This Court held that, on these facts, neither defendant's conviction under Section 924(c) for "us[ing]" a firearm in connection with a drug offense could be sustained. The Court explained that the word "use" in the statute contemplates "active employment" of the firearm, 116 S. Ct. at 506, such as by brandishing, displaying, firing, or bartering it, *id.* at 508; mere placement of a firearm to provide security or to embolden the defendant is not sufficient, *ibid.* The Court concluded that, since the defendants in *Bailey* did not actively employ the firearms in question, they did not "use" them within the meaning of the statute. *Id.* at 509.

Bailey does not mean that a Section 924(c) prosecution may not rest on a *Pinkerton* or aiding and abetting theory. The Court's sole concern in *Bailey* was to construe the meaning of the word "use" in Section 924(c), and the Court's only holding was that "use" requires "active employment." Nothing in *Bailey* casts doubt on the proposition that a defendant, either under *Pinkerton* or as an aider and abettor, may be convicted of a Section 924(c) offense based on the active use of a weapon by someone else. Indeed, there is no sound reason why the *Pinkerton* and aiding and abetting theories should be less applicable to Section 924(c) offenses than to the other diverse crimes proscribed by federal criminal law.

As petitioner concedes (Pet. 9), the courts of appeals that have addressed the issue after *Bailey* have routinely held that a defendant may be convicted under Section 924(c) on a *Pinkerton* or aiding and abetting theory. See *United States* v. *Pimentel*, 83 F.3d 55, 58-59 (2d Cir. 1996) (*Pinkerton*); *United States* v. *Fike*, 82 F.3d 1315, 1328 (5th Cir. 1996) (*Pinkerton*); *United States* v. *Spring*, 80 F.3d 1450, 1466 (10th Cir. 1996) (aiding and abetting), petition for cert. pending, No. 95-9420; *United States* v. *Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996) (both theories), petition for cert. pending, No. 95-9278; *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996) (aiding and abetting); *United States* v. *Monroe*, 73 F.3d 129, 132 (7th Cir. 1995) (*Pinkerton*).

The sole contrary authority cited by petitioner is the district court decision in *United States* v. *Foreman*, 914 F. Supp. 385 (C.D. Cal. 1996). In *Foreman*, the defendant was charged with a Section 924(c) offense arising from his attempted robbery of a bank with three other men. The district court barred the government, in proving the Section 924(c) charge, from relying on the theory that the defendant aided and abetted the use or carrying of a firearm by another participant in the robbery. The court did not hold that the aiding and abetting statute never applies to Section 924(c) offenses; rather, it held that, in order to aid and abet the offense, a person must participate in the actual use or carrying of the weapon, such as by handing the weapon to an accomplice, grabbing hold of his arm while he is carrying the weapon, or counseling or commanding him to use or carry the weapon. 914 F. Supp. at 386-387. That analysis is incorrect. To qualify as an aider and abettor of a Section 924(c) offense, it is enough for a

person to know that an accomplice will use or carry a weapon during a robbery, and that such use was voluntary. See *United States* v. *Price*, 76 F.3d at 529 (upholding aiding and abetting instruction on facts similar to those in *Foreman*).[2] Those facts were established beyond a reasonable doubt in this case.[3] In any event, this Court does not grant certiorari to review a court of appeals decision merely because it conflicts with a decision of a district court. See Sup. Ct. R. 10.

2. Petitioner contends (Pet. 14-21) that the court of appeals erred in holding that the district court's failure to give an "operation or management" instruction in connection with the substantive RICO count was harmless. He argues that a court's omission of that instruction is not subject to harmless-error analysis.

This Court has held that an instructional error relating to an element of the offense is harmless if it is clear that, despite the erroneous instruction, the jury found the element in question. For example, in *Rose* v. *Clark*, 478 U.S. 570 (1986), the jury in a murder trial was incorrectly instructed that it could presume the element of malice if it found certain predicate facts. "When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.* at 580. The Court explained that "[i]n many cases, the predicate facts conclusively establish intent, so

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[2] In *Price*, the Third Circuit cited numerous court of appeals decisions in support of its holding. See 76 F.3d at 529.

[3] Contrary to petitioner's contention (Pet. 12), the evidence at trial showed that petitioner knew that his co-conspirators carried guns during the truck hijackings. Pet. App. 18a.

that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." *Id.* at 580-581. The Court observed that in such circumstances "the erroneous instruction is simply superfluous," because a properly instructed jury would have reached the same verdict. *Id.* at 581. Accordingly, the Court held that harmless-error analysis should be applied to evaluate the erroneous instruction. *Id.* at 582. See also *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (remanding for a determination regarding harmlessness where the trial court erroneously instructed the jury that it could presume fraudulent intent and embezzlement from the existence of certain facts); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (holding that erroneous instruction allowing jury to determine that allegedly obscene material had "value" under a community standard rather than a reasonable person standard was subject to harmless-error analysis).

Under the Court's approach, the district court's omission to give an "operation or management" instruction was harmless. As the court of appeals found, "the evidence at trial indicated that [petitioner's] only role within the crew was that of a leader. Therefore, the jury only could have found that [petitioner] either was the leader of the crew or was not a crew member at all." Pet. App. 11a. Accordingly, the jury could not have returned a guilty verdict on the substantive RICO count without concluding that petitioner was a leader of the crew; if it had concluded that he was not a leader, there would have been no rational basis for it to convict. There can be no doubt, therefore, that the jury would have returned the same guilty verdict even if it had

properly received an "operation and management" instruction. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 367 (D.C. Cir.) (holding that jury which was erroneously instructed on an element of the offense necessarily found the element in question beyond a reasonable doubt), cert. denied, 488 U.S. 821 (1988); *United States* v. *Webster*, 639 F.2d 174, 181 (4th Cir.) (same), cert. denied, 454 U.S. 857 (1981); *United States* v. *Jacobs*, 475 F.2d 270, 283 (2d Cir.) (same), cert. denied, 414 U.S. 821 (1973).

Petitioner's reliance (Pet. 18) on *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), is unavailing. In that case, the Court held that the giving of a constitutionally defective reasonable-doubt instruction can never be harmless. The Court explained that, by misdescribing the burden of proof, a deficient reasonable-doubt instruction "vitiates" all the jury's factual findings. *Id.* at 2082. A reviewing court in such a case can only engage in "pure speculation" about what a properly instructed jury would have done, and to attempt to do so would improperly substitute its judgment for that of the jury. *Ibid.* The Court added that the giving of a constitutionally defective reasonable-doubt instruction amounts to a "structural" error in "the constitution of the trial mechanism" which, because its effect is unquantifiable, "def[ies] analysis by 'harmless-error' standards." *Ibid.*, quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). Other trial errors, by contrast, may be subject to harmless-error analysis if they occur "during the presentation of the case to the jury, and * * * may therefore be quantitatively assessed in the context of other evidence presented." 113 S. Ct. at 2082-2083, quoting *Fulminante*, 499 U.S. at 307-308.

This case is significantly different from *Sullivan*. In order to hold that the district court's failure to give an "operation or management" instruction was harmless, the court of appeals here did not have to engage in speculation or substitute its judgment for that of the jury; rather, it could conclusively determine from the record of the case that the jury, despite the instructional error, actually found that petitioner was a leader of the RICO enterprise. By the same token, because the effect on the verdict of the non-constitutional instructional error was measurable "in the context of other evidence presented," *Sullivan*, 113 S. Ct. at 2083, the error in this case did not rise to the level of a structural defect like the one in *Sullivan*.

Nor is petitioner helped by the Sixth and Ninth Circuit and state decisions on which he relies (Pet. 15-17 & nn. 8 & 10-11).[4] In the cases that petitioner

[4] See *Harmon* v. *Marshall*, 69 F.3d 963, 965-966 (9th Cir. 1995) (per curiam) (complete omission of elements of offense); *United States* v. *Hove*, 52 F.3d 233, 235-236 (9th Cir. 1995) (omission of scienter); *United States* v. *Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994) (conflicting instructions), cert. denied, 115 S. Ct. 1170 (1995); *United States* v. *Rogers*, 9 F.3d 1025, 1032 (2d Cir. 1993) (directed verdict on element of crime), cert. denied, 115 S. Ct. 95 (1994); *Hoover* v. *Garfield Heights Municipal Court*, 802 F.2d 168, 176-177 (6th Cir. 1986) (same), cert. denied, 480 U.S. 949 (1987); *State* v. *White*, 543 N.W.2d 725, 730-731 (Neb. 1996) (per curiam) (omission of scienter). Two other state cases cited are inapposite. See *State* v. *Brown*, 647 A.2d 17, 24 (App. Ct.) (holding instructions invalid under state constitution), certif. denied, 649 A.2d 254 (Conn. 1994); *Jarrel* v. *State*, 413 S.E.2d 710, 713 (Ga. 1992) (vacating and remanding for resentencing because evidence was sufficient to establish death sentence aggravating circumstances even though they had not been properly charged).

contends conflict with the decision here, the courts did not have the underlying factual predicate on which the court of appeals in this case rested its holding: that, despite the instructional error, the jury necessarily found facts and rendered a verdict sufficient to establish beyond a reasonable doubt the described element omitted from the instructions.

In more recent cases, both the Ninth and Sixth Circuits have indicated that the omission of an element from the jury instructions may be harmless error under that approach, *i.e.*, where the findings that the jury made under other instructions establish that it found the omitted or misdescribed element beyond a reasonable doubt. See *Roy* v. *Gomez*, 81 F.3d 863, 866-867 (9th Cir. 1996) (en banc) (omission of specific intent element from jury instructions is harmless where jury necessarily found the omitted element; distinguishing cases on which petitioner here relies); *United States* v. *McGhee*, No. 95-6323, 1996 WL 347000 (6th Cir. June 26, 1996) (affirming conviction in plain error setting, where, although trial court did not submit element of the offense to the jury, the error was harmless in light of other findings the jury necessarily made).[5]

In addition, in most of the cases cited by petitioner, the trial court failed completely to instruct the jury on one or more elements of an offense. Here, by contrast, the court properly advised the jury that, in

[5] We note that other Sixth Circuit cases are internally inconsistent on the application of harmless error inquiry to the omission of an element. Compare *United States* v. *Nelson*, 27 F.3d 199 (1994) (omitted element constituted plain error) with *United States* v. *Dotson*, 895 F.2d 263 (omitted element constituted harmless error in light of strength of evidence), cert. denied, 498 U.S. 831 (1990).

order to convict on the substantive RICO count, it must find that petitioner conducted or participated in the conduct of the enterprise. 5 C.A. App. A2659-A2660. Hence, there was no omission to instruct the jury on an element of the offense, only a failure sufficiently to elaborate on the element by giving an "operation or management" instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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